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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
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10/810,958

03/26/2004

Christopher P. Henderson

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07/23/2009

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EXAMINER

PATEL, NIHIR B

ART UNIT

PAPER NUMBER

3772

NOTIFICATION DATE

DELIVERY MODE

07/23/2009

ELECTRONIC

Please find below and/or attached an Office communication concerning this application or proceeding.

The time period for reply, if any, is set in the attached communication.

Notice of the Office communication was sent electronically on above-indicated "Notification Date" to the following e-mail address(es):

LegalUSDocketing@mmm.com

LegalDocketing@mmm.com

Advisory Action Before the Filing of an Appeal Brief	Application No. 10/810,958	Applicant(s) HENDERSON ET AL.	
	Examiner NIHIR PATEL	Art Unit 3772	

--The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

THE REPLY FILED 07.02.2009 FAILS TO PLACE THIS APPLICATION IN CONDITION FOR ALLOWANCE.

1. ☒ The reply was filed after a final rejection, but prior to or on the same day as filing a Notice of Appeal. To avoid abandonment of this application, applicant must timely file one of the following replies: (1) an amendment, affidavit, or other evidence, which places the application in condition for allowance; (2) a Notice of Appeal (with appeal fee) in compliance with 37 CFR 41.31; or (3) a Request for Continued Examination (RCE) in compliance with 37 CFR 1.114. The reply must be filed within one of the following time periods:

- a) ☐ The period for reply expires _____ months from the mailing date of the final rejection.
 b) ☒ The period for reply expires on: (1) the mailing date of this Advisory Action, or (2) the date set forth in the final rejection, whichever is later. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the mailing date of the final rejection.

Examiner Note: If box 1 is checked, check either box (a) or (b). ONLY CHECK BOX (b) WHEN THE FIRST REPLY WAS FILED WITHIN TWO MONTHS OF THE FINAL REJECTION. See MPEP 706.07(f).

Extensions of time may be obtained under 37 CFR 1.136(a). The date on which the petition under 37 CFR 1.136(a) and the appropriate extension fee have been filed is the date for purposes of determining the period of extension and the corresponding amount of the fee. The appropriate extension fee under 37 CFR 1.17(a) is calculated from: (1) the expiration date of the shortened statutory period for reply originally set in the final Office action; or (2) as set forth in (b) above, if checked. Any reply received by the Office later than three months after the mailing date of the final rejection, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

NOTICE OF APPEAL

2. ☐ The Notice of Appeal was filed on _____. A brief in compliance with 37 CFR 41.37 must be filed within two months of the date of filing the Notice of Appeal (37 CFR 41.37(a)), or any extension thereof (37 CFR 41.37(e)), to avoid dismissal of the appeal. Since a Notice of Appeal has been filed, any reply must be filed within the time period set forth in 37 CFR 41.37(a).

AMENDMENTS

3. ☐ The proposed amendment(s) filed after a final rejection, but prior to the date of filing a brief, will not be entered because
 (a) ☐ They raise new issues that would require further consideration and/or search (see NOTE below);
 (b) ☐ They raise the issue of new matter (see NOTE below);
 (c) ☐ They are not deemed to place the application in better form for appeal by materially reducing or simplifying the issues for appeal; and/or
 (d) ☐ They present additional claims without canceling a corresponding number of finally rejected claims.

NOTE: _____. (See 37 CFR 1.116 and 41.33(a)).

4. ☐ The amendments are not in compliance with 37 CFR 1.121. See attached Notice of Non-Compliant Amendment (PTOL-324).
 5. ☐ Applicant's reply has overcome the following rejection(s): _____.
 6. ☐ Newly proposed or amended claim(s) _____ would be allowable if submitted in a separate, timely filed amendment canceling the non-allowable claim(s).
 7. ☒ For purposes of appeal, the proposed amendment(s): a) ☒ will not be entered, or b) ☐ will be entered and an explanation of how the new or amended claims would be rejected is provided below or appended.
 The status of the claim(s) is (or will be) as follows:
 Claim(s) allowed: _____.
 Claim(s) objected to: _____.
 Claim(s) rejected: 1 and 3-34.
 Claim(s) withdrawn from consideration: _____.

AFFIDAVIT OR OTHER EVIDENCE

8. ☐ The affidavit or other evidence filed after a final action, but before or on the date of filing a Notice of Appeal will not be entered because applicant failed to provide a showing of good and sufficient reasons why the affidavit or other evidence is necessary and was not earlier presented. See 37 CFR 1.116(e).
 9. ☐ The affidavit or other evidence filed after the date of filing a Notice of Appeal, but prior to the date of filing a brief, will not be entered because the affidavit or other evidence failed to overcome all rejections under appeal and/or appellant fails to provide a showing a good and sufficient reasons why it is necessary and was not earlier presented. See 37 CFR 41.33(d)(1).
 10. ☐ The affidavit or other evidence is entered. An explanation of the status of the claims after entry is below or attached.

REQUEST FOR RECONSIDERATION/OTHER

11. ☒ The request for reconsideration has been considered but does NOT place the application in condition for allowance because: see attached sheet.
 12. ☐ Note the attached Information *Disclosure Statement*(s). (PTO/SB/08) Paper No(s). _____.
 13. ☐ Other: _____.

/Patricia Bianco/
 Supervisory Patent Examiner, Art Unit 3772

/Nihir Patel/
 Examiner, Art Unit 3772

Applicant's arguments filed July 16th, 2009 have been fully considered but they are not persuasive. One of the points the applicant argues is that the Nelson reference does not teach a mask body that lacks a rigid insert. The applicant further states that the hard shell 12 of the Nelson reference defines the rigid insert. The examiner disagrees with the applicant's argument. The examiner would like to point out that the mask body and rigid insert are two different components. The applicant "claims a mask body that lacks a rigid insert that is non-elastomeric...", The mask body 12 of the Nelson reference lacks a rigid insert and is of a non-elastomeric material (see col. 2 lines 20-40).

Applicant further argues that there is no indication that Nelson's hard shell would be able to be deformed such that the first and second cheek portions of the mask can be moved towards each other about an axis when the mask is held stationary and a force is exerted on the nose and chin portions. The examiner disagrees with the applicant's argument. See figs. 6 and 7, inherently when the mask is used as shown in fig. 7, the mask body can move toward each other about an axis when the mask is held stationary and a force is exerted on the nose and chin portions.

Applicant further argues that Nelson does not indicate that its mask body is capable of exhibiting such deflections when 5 Newtons of force is applied. The examiner disagrees with the applicant's argument. As stated in the office action dated September 23rd, 2008, it would have been obvious to one having ordinary skill in the art at the time the invention was made to provide a numerical value of the deflection or a numerical value of the force required for the mask body deflection test, since it has been held that discovering an optimum value of a result effective variable involves only routine skill in the art. In re Boesch, 617 F 2d 272, 205 USPQ 215 (CCPA 1980).